Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 24, 1994

Honorable Robert T. Jarvis
Grayson County Attorney
Grayson County Justice Center
Suite 116A
Sherman, Texas 75090

Letter Opinion No. 94-008

Re: Whether a home-rule municipality may use public funds to pay one year of the property taxes, maintenance costs, and insurance costs for a private nonprofit corporation that holds land within the municipality for sale to industrial prospects (ID# 22659)

Dear Mr. Jarvis:

You have asked us to determine whether a home-rule municipality may use public funds to pay one year of the property taxes, maintenance costs, and insurance costs for a private nonprofit corporation that holds land within the municipality for sale to industrial prospects. You explain:

> Sherman Industrial District, Inc. (SID), a private, non-profit corporation, holds land for sale to industrial prospects. SID seeks to provide land at fair prices, create jobs and thereby enlarge the tax base, and ensure that the purchaser is compatible with existing industry. The City of Sherman is a home rule municipality whose city limits encompass the property held by SID.
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> In 1986, SID purchased undeveloped land in an industrial park and a former Safeway building for a total of $406,000.00. Local banks agreed to participate in the indebtedness of SID. SID has been unable to sell the property, and interest continues to accrue on the principal.
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> In June 1992, SID and the local banks entered into a stand still agreement. Under this agreement the banks would not foreclose provided that SID pay its taxes, insurance, and maintenance on the property. SID now seeks economic assistance from the City of Sherman to pay one year of ad valorem taxes, maintenance and insurance on SID's property. The amount of this assistance is $11,563.47 ($2,299.57 for insurance, $8,763.90 for taxes, and $500.00 for maintenance and supervision[])[.]

As a home-rule municipality, the City of Sherman (the "city") possesses the full power of self-government, provided that no ordinance "shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." *See* Tex. Const. art. XI, § 5; *City of Dallas v. Dallas*

Merchants & Concessionaires Ass'n, 823 S.W.2d 347, 352 (Tex. App.--Dallas 1991, no writ); *City of Brownsville v. Public Util. Comm'n*, 616 S.W.2d 402, 407 (Tex. Civ. App.--Texarkana 1981, writ ref'd n.r.e.); *Crownhill Homes, Inc. v. City of San Antonio*, 433 S.W.2d 448, 455 (Tex. Civ. App.--Corpus Christi 1968, writ ref'd n.r.e.); Attorney General Opinion JM-1087 (1989) at 2; JM-805 (1987) at 1; *see also* Local Gov't Code § 51.072(a) (providing that home-rule municipality has full power of local self-government); V.T.C.S. art. 1175, *as amended by* Acts 1993, 73d Leg., ch. 455, § 1, at 1831, 1831-33 (enumerating specific powers that home-rule municipality has). *See generally* 52 TEX. JUR. 3d *Municipalities* §§ 28-29, at 48-50 (1987) (discussing home-rule charters); 2 D. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 681-87 (1977) (explaining Texas Constitution article XI, section 5). The city thus "looks to the legislature not for power to act, but *only* to determine whether the legislature has limited its broad constitutional power." *Dallas Merchants & Concessionaires Ass'n*, 823 S.W.2d at 352 (citing *Burch v. City of San Antonio*, 518 S.W.2d 540, 543 (Tex. 1975); *MJR's Fare v. City of Dallas*, 792 S.W.2d 569, 573 (Tex. App.--Dallas 1990, writ denied) (op. on reh'g)). A home-rule municipality also may not act in any way that is inconsistent with its charter. *See City of Brownsville*, 616 S.W.2d at 407; Attorney General Opinion JM-805 at 1. You do not provide us with any information by which we can determine whether the expenditure you describe would violate the city charter; thus, we do not consider that question.[1]

You specifically ask about the limitations that article III, section 52(a) and article XI, section 3 of the Texas Constitution impose upon a municipality's authority to appropriate or donate money to a private corporation or association. Article III, section 52(a) of the constitution provides in pertinent part as follows:

> Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual,association or corporation whatsoever, or to become a stockholder in such corporation, association or company.

Article XI, section 3 of the constitution provides in pertinent part as follows:

> No county, city, or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit . . . .

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[1]Moreover, this office does not construe municipal charters. Attorney General Opinion JM-846 (1988) at 1. Rather, a city attorney bears primary responsibility for interpreting his or her city charter. *See* Attorney General Opinion JM-805 (1987) at 1 n.1.

For our purposes here, article XI, section 3 duplicates article III, section 52(a).[2] *See* 2 BRADEN, *supra*, at 676.

Both article III, section 52(a) and article XI, section 3 of the Texas Constitution prohibit a political subdivision of the state from granting public money to a private entity. *See also* Tex. Const. art. III, §§ 50, 51. *See generally* 1 BRADEN, *supra*, at 232-35, 257-59 (explaining article III, sections 51 and 52 of Texas Constitution); 2 BRADEN, *supra*, at 676-78 (explaining article XI, section 3 of Texas Constitution). This office has interpreted these provisions to prohibit any grant for private purposes only; they do not prohibit a grant of public money for public purposes if the political subdivision granting the money places sufficient controls on the transaction to ensure that the public purpose is carried out.[3] *See* Attorney General Opinions JM-1229 (1990) at 3-6 (and sources cited

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[2]Braden concedes that

> [t]he flat statement . . . that Section 3 duplicates Section 52 is not strictly true. Section 52 covers grants and loans to individuals whereas Section 3 does not. Both sections cover counties and cities; Section 52 adds towns and other political corporations and subdivisions whereas Section 3 adds only other municipal corporations. Section 3 is a direct limitation on the power of local governments whereas Section 52 limits the power of the legislature to permit local governments to make grants and loans. But this seems to be a distinction without a difference because local governments derive their power from the state. It was once argued, however, that Section 3 might be operative when Section 52 was not. "Where, however, as in the case of home rule cities and some other types of municipal corporations, they might derive their powers directly or, at least, in part directly from the Constitution, then the specific provisions of this section appear to have vitality and act independently of Section 52 of Article 3." (3 *Constitutional Revision* 168.) In support of that statement, the case of *Moore v. Meyers*, []282 S.W.2d 94 (Tex. Civ. App.--Fort Worth 1955, *writ ref'd n.r.e.*)[], is cited. Nothing in the case appears to support the argument.

[3]You have cited *Key v. Commissioners Court of Marion County*, 727 S.W.2d 667 (Tex. App.--Texarkana 1987, no writ), for the proposition that "because the city [will] not exercise control over the way in which [SID] functions, . . . the expenditure is not for a public purpose." In *Key v. Commissioners Court of Marion County* a private citizen had filed suit against the county commissioners court alleging that the county's approval of the transfer of a biannual publication as well as control of the "Christmas Candlelight Tour" from the Marion County Historical Commission, a state-created agency whose operation the county commissioners court oversees, to the Historic Jefferson Foundation, a private nonprofit corporation, violated article III, section 52 and article XI, section 3 of the constitution. *Id.* at 668. The commissioners court argued that the court should incorporate into article III, section 52 and article XI, section 3 of the constitution a "public purpose" exception. *Id.* at 669. The commissioners court contended that the proposed transfer of the publication and control of the Christmas Candlelight Tour served a public purpose and therefore did not violate the constitution. *Id.* In support of its argument, the commissioners court cited cases, such as *Barrington v. Cokinos*, 338 S.W.2d 133 (Tex. 1960), *Davis v. City of Taylor*, 67 S.W.2d 1033 (Tex. 1934), and *Byrd v. City of Dallas*, 6 S.W.2d 738 (1928), showing that the constitution does not prohibit transfers of money to private corporations if the transfer accomplishes a public purpose, although the transfer also benefits a private interest. *Id.*

therein); H-357 (1974) at 5; M-1023 (1971) at 2-7; *see also Barrington v. Cokinos*, 338 S.W.2d 133, 140 (Tex. 1960); 1 BRADEN, *supra*, at 233; 2 BRADEN, *supra*, at 676-77.

No fixed rule delineates exactly what constitutes a "public purpose." *See Davis v. City of Taylor*, 67 S.W.2d 1033, 1034 (Tex. 1934) (quoting 6 MCQUILLEN ON MUNICIPAL CORPORATIONS § 2532, at 292 (2d ed. 1940)) (stating that, "What is a public purpose cannot be answered by any precise definition further than to state that if an object is beneficial to the inhabitants and directly connected with the local government it will be considered a public purpose"). Rather, the governing board of the relevant political subdivision must determine in the first instance whether a particular grant of public money serves a legitimate public purpose, and whether the political subdivision has placed sufficient controls on the transaction to ensure that the public purpose will be carried out. Accordingly, prior to expending public funds to pay one year of the property taxes, maintenance costs, and insurance costs for SID, the governing board of the city must determine in the first instance that such expenditure serves a legitimate public purpose and that the city has placed sufficient controls on the transaction to ensure that the public purpose will be carried out.[4] This office cannot say as a matter of law that the

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(footnote continued)

The court rejected the commissioners court's argument. "Each case cited is readily distinguishable from the present situation. These cases involve contractual agreements for services or property entered into by a governmental arm with private business. In this case we have no such contractual obligation and no retention of formal control. Had the Historic Jefferson Foundation obligated itself contractually to perform a function beneficial to the public, this obligation might be deemed consideration, and where sufficient consideration exists, Article III, § 52(a) of the Texas Constitution would not be applicable to the transaction. . . . [T]he unifying theme of the cited cases shows that some form of continuing public control is necessary to insure that the State agency receives its consideration: accomplishment of the public purpose." *Id.* We read the court's statements to support the standard this office long has applied for determining whether a proposed expenditure of public funds violates article III, section 52(a) or article XI, section 3 of the constitution: These constitutional provisions do not prohibit a grant of public money for public purposes *if the political subdivision granting the money places sufficient controls on the transaction to ensure that the public purpose is carried out.* *See* Attorney General Opinions JM-1229 (1990) at 3-6 (and sources cited therein); H-357 (1974) at 5; M-1023 (1971) at 2-7; *see also Barrington v. Cokinos*, 338 S.W.2d 133, 140 (Tex. 1960); 1 BRADEN, *supra*, at 233; 2 BRADEN, *supra*, at 676-77. We do not believe this necessarily requires a political subdivision to control the way the recipient of public funds functions.

[4]In regard to whether the expenditure you propose might serve a public purpose, we note that the legislature has authorized cities to acquire, through construction, purchase, devise, gift, or lease, land, buildings, equipment, and facilities for the purpose of promoting industrial development. *See* V.T.C.S. art. 5190.1, § 4(a)(1); *see also id.* § 2(a), (f), (g), (j). The legislature also has authorized a city's governing body to approve the creation of an industrial development corporation to act on behalf of the city, *see id.* art. 5190.6, § 4(a), or, if the city has a population of 50,000 or fewer and meets several other requirements, *see id.* § 4A(a)(2), or is located in a county with a population of 500,000 or fewer, the city itself may create an industrial development corporation, *id.* § 4A(b). The legislature expressly has found that acquisitions under V.T.C.S. article 5190.1 or the creation of industrial development corporations under V.T.C.S. article 5190.6 serve a public purpose. *See* V.T.C.S. art. 5190.1, § 18; *id.* art. 5190.6, § 3. Additionally, this office has found in a previous opinion that a home-rule city may, under article III, section 52 and article XI, section 3 of the Texas Constitution, form a nonprofit corporation for "the public . . . purpose of acquiring and improving land for industrial development." Attorney General Opinion

expenditure you describe serves a public purpose, or that the municipality has imposed sufficient controls on the transaction to ensure that the public purpose will be carried out.

SUMMARY

Pursuant to article III, section 52(a) and article XI, section 3 of the Texas Constitution, the governing board of a home-rule municipality must, prior to expending public funds to pay one year of the property taxes, maintenance costs, and insurance costs for a private nonprofit corporation that holds land within a municipality for sale to industrial prospects, determine in the first instance that such expenditure serves a legitimate public purpose and that the city has placed sufficient controls on the transaction to ensure that the public purpose will be carried out.

Yours very truly,

Kymberly K. Oltrogge

Kymberly K. Oltrogge
Assistant Attorney General
Opinion Committee

(footnote continued)
M-1023 (1971) at 9. *But see* Attorney General Opinion H-357 (1974) at 3 (stating that V.T.C.S. article 5190.1 violates constitutional requirement that public funds be expended for public purpose).